IN THE SUPREME COURT OF TEXAS

NO. 02-1084

IN RE BURLINGTON COAT FACTORY WAREHOUSE OF MCALLEN, INC., RELATOR

ON PETITION FOR WRIT OF MANDAMUS

CHIEF JUSTICE JEFFERSON delivered the opinion of the Court, in which JUSTICE HECHT, JUSTICE WAINWRIGHT, JUSTICE BRISTER, JUSTICE MEDINA and JUSTICE GREEN joined.

JUSTICE O'NEILL filed a dissenting opinion, in which JUSTICE JOHNSON joined as to Part I.

In this case, relator Burlington Coat Factory Warehouse of McAllen, Inc. (Burlington) contends that the trial court abused its discretion by allowing execution to issue before a final judgment had been entered. We agree. Because we conclude that Burlington lacks an adequate remedy by appeal, we conditionally grant a writ of mandamus directing the trial court to vacate its orders permitting execution of the judgment.

On November 29, 2001, Evangelina Garcia sued Burlington for injuries sustained while shopping at a Burlington retail store in McAllen. Garcia sought to recover both actual and exemplary damages. Burlington did not file an answer in the trial court, and on March 25, 2002, the trial court rendered a default judgment in favor of Garcia. The judgment included a finding that Burlington was negligent, and it awarded Garcia $183,000 plus post-judgment interest. It further provided that "[a]ll other relief not expressly granted is hereby denied." The default judgment was

silent, however, on the exemplary damages claim. Burlington timely filed a motion for new trial, and the trial court signed an order granting the new trial on August 12, 2002.

Garcia contended in the trial court that the order granting a new trial was void for lack of jurisdiction; specifically, Garcia argued that the March 25 judgment was a final judgment, and that the trial court's plenary power therefore expired on July 10, 2002 — 105 days after the judgment was signed. *See Philbrook v. Berry*, 683 S.W.2d 378, 379 (Tex. 1985); TEX. R. CIV. P. 329b(a), (c), (e). On August 21, 2002, the trial court entered a docket notation indicating that the new trial was cancelled due to a lack of jurisdiction; however, the trial court did not sign a written order to that effect.

In September 2002, Garcia attempted to enforce the judgment through execution. In order to avoid execution on its retail merchandise, Burlington placed $191,523.24 in the registry of the court.[1] Burlington also filed a motion to quash execution, arguing that the trial court's judgment was interlocutory and therefore not yet subject to execution. The trial court denied the motion to quash

[1] Burlington enclosed a letter to the Cameron County deputy sheriff with the funds; the letter stated that "this check is being sent on the understanding that the execution proceedings will cease forthwith." Garcia asserts that this letter constitutes a Rule 11 agreement to settle the case. *See* TEX. R. CIV. P. 11 ("Unless otherwise provided in these rules, no agreement between attorneys or parties touching any suit pending will be enforced unless it be in writing, signed and filed with the papers as part of the record, or unless it be made in open court and entered of record."). However, we have held that Rule 11, like the statute of frauds, requires a "written memorandum which is complete within itself in every material detail, and which contains all of the essential elements of the agreement," so that the agreement "can be ascertained from the writings without resorting to oral testimony." *Padilla v. LaFrance*, 907 S.W.2d 454, 460 (Tex. 1995); *Cohen v. McCutchin*, 565 S.W.2d 230, 232 (Tex. 1978). This letter does not express an agreement between parties or counsel. The letter was addressed only to the deputy sheriff, not to Ms. Garcia or her attorneys. Nothing in the letter indicates that the attorneys or parties had reached an agreement, and nothing in the letter describes the essential terms of such an agreement.

execution and ordered that the monies in the registry of the court be released to Garcia's attorney, William E. Corcoran. Burlington then sought mandamus relief.[2]

We agree that the trial court's March 25 judgment was interlocutory rather than final. Although a judgment following a trial on the merits is presumed to be final, there is no such presumption of finality following a summary judgment or default judgment. *See Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 199–200 (Tex. 2001) ("[T]he ordinary expectation that supports the presumption that a judgment rendered after a conventional trial on the merits will comprehend all claims simply does not exist when some form of judgment is rendered without such a trial."); *Houston Health Clubs, Inc. v. First Court of Appeals*, 722 S.W.2d 692, 693 (Tex. 1986). Thus, while a clause stating that "all other relief not expressly granted is hereby denied" indicates that a post-trial judgment is final, it does not establish finality with regard to a default judgment. *See Lehmann*, 39 S.W.3d at 203–04.

A judgment that actually disposes of all parties and all claims is final, regardless of its language; however, a default judgment that fails to dispose of all claims can be final only if "intent to finally dispose of the case" is "unequivocally expressed in the words of the order itself." *Id*. at 200. The default judgment in this case failed to dispose of all claims; it awarded damages "[o]n the claim of negligence" but failed to dispose of Garcia's claim for exemplary damages based on gross

[2] In addition to seeking a writ of mandamus, Burlington also filed a bill of review in the trial court. Garcia now asserts that (1) Burlington's decision to seek a bill of review judicially estops it from contending that the judgment was interlocutory, and (2) Burlington's statements in the bill-of-review proceeding amount to a judicial admission that the judgment was final. We disagree. Parties may pursue a bill of review while pursuing other relief, and assertions in such alternative pleadings are not judicial admissions. *See Houston First Am. Sav. v. Musick*, 650 S.W.2d 764, 767 (Tex. 1983); *see also Havens v. Ayers*, 886 S.W.2d 506, 511 (Tex. App.—Houston [1st Dist.] 1994, no writ).

negligence. *See Houston Health Clubs, Inc.*, 722 S.W.2d at 693 (holding that a default judgment that "did not dispose of the punitive damage issue" was not final). Because the judgment does not dispose of all the claims, it cannot be final unless its words "unequivocally express" an "intent to finally dispose of the case." *See Lehmann*, 39 S.W.3d at 200.

In *Lehmann*, we provided an example of unequivocal language that would clearly indicate finality, noting that "[a] statement like, 'This judgment finally disposes of all parties and all claims and is appealable', would leave no doubt about the court's intention." *Lehmann*, 39 S.W.3d at 206. This default judgment lacks such an unequivocal expression. It does not state that it is a final judgment. In addition, it does not purport to dispose of all parties and all claims, and it does not actually dispose of Garcia's claim for punitive damages. It is true that the judgment awarded costs and provided that Garcia "is entitled to enforce this judgment through abstract, execution and any other process necessary." However, these factors are not dispositive; the judgment in *Houston Health Clubs* similarly awarded costs, awarded interest from the date of judgment, and provided that the plaintiff "shall have any and all such writs, attachments, executions, and processes as may be necessary to accomplish the relief granted to her herein." *Erwin v. Houston Health Clubs Inc.*, No. 85–07146 (157th Dist. Ct., Harris County, Tex., May 14, 1985). Nevertheless, we concluded that the judgment in that case was not final because it did not actually dispose of the plaintiff's claim for punitive damages. *See Houston Health Clubs, Inc.*, 722 S.W.2d at 693.

Furthermore, trial courts sometimes use this wording in interlocutory judgments that are intended to become final only when other claims are later adjudicated. *See, e.g., Auto. Ins. Co. v. Young*, No. 07–00–0469–CV, 2001 Tex. App. LEXIS 4188, 2001 WL 708505 (Tex. App.—Amarillo

June 25, 2001, no pet.) (not designated for publication). In *Young*, the trial court granted an interlocutory judgment in favor of one plaintiff against one defendant. *Id.* Although the judgment provided that "IT IS FURTHER ORDERED, ADJUDGED and DECREED that Plaintiff, MYRTLE YOUNG is entitled to enforce this judgment through abstract, execution, and any other process," the judgment was not intended to be final; there were additional parties whose claims were still pending before the trial court, and the judgment could not become final until those claims were adjudicated or severed. *Id.*; *see also* TEX. R. CIV. P. 41.

We cannot conclude that language permitting execution "unequivocally express[es]" finality in the absence of a judgment that actually disposes of all parties and all claims. *See Lehmann*, 39 S.W.3d at 200. A judgment "must be read in light of the importance of preserving a party's right to appeal"; if we imply finality from anything less than an unequivocal expression, a party's right to appeal may be jeopardized. *Id.* at 195, 206 ("[W]hether a judicial decree is a final judgment must be determined from its language and the record in the case. Since timely perfecting appeal (as well as filing certain post-judgment motions and requests) hangs on a party's making this determination correctly, certainty is crucial."). Because the judgment's language does not unequivocally express that it was intended to be final and because the judgment does not dispose of all claims, we conclude that it is interlocutory.

Because the default judgment was interlocutory, the trial court abused its discretion by permitting execution to issue. First, an interlocutory judgment may not be enforced through execution. TEX. R. CIV. P. 622 (permitting execution only in cases "in which a final judgment has been rendered"); *Nalle v. Harrell*, 12 S.W.2d 550, 551 (Tex. 1929). Second, at the time the trial

court permitted execution, there was not even an interlocutory judgment then in force; the trial court vacated the default judgment when it granted Burlington's motion for new trial on August 12, 2002. Because the default judgment was interlocutory, the trial court retained jurisdiction to set the judgment aside and order a new trial. *See Fruehauf Corp. v. Carrillo*, 848 S.W.2d 83, 84 (Tex. 1993) ("The trial court also retains continuing control over interlocutory orders and has the power to set those orders aside any time before a final judgment is entered."). Moreover, the court's later docket entry "cancelling" the new trial was ineffective to set aside the order granting a new trial; a docket entry does not constitute a written order. *Hamilton v. Empire Gas & Fuel Co.*, 110 S.W.2d 561, 566 (Tex. 1937) (holding that "[j]udgments and orders of courts of record to be effectual must be entered of record," and concluding that "[n]either entries in the judge's docket nor affidavits can be accepted as substitute for such record; and docket entries, affidavits, and other like evidence can neither change nor enlarge judgments or orders as entered in the minutes of the court"). Consequently, there was no judgment in force — much less a final judgment — at the time the trial court ordered execution.

We further conclude that Burlington has no adequate remedy by appeal. We have previously recognized that there is no adequate remedy by appeal when a trial court ignores its earlier order granting a new trial. *See In re Barber*, 982 S.W.2d 364, 368 (Tex. 1998). There is also no adequate remedy by appeal for allowing execution to issue before a final judgment has been entered. *See In re Tarrant County*, 16 S.W.3d 914, 918–19 (Tex. App.—Fort Worth 2000, orig. proceeding) (noting that a litigant has the right to supersede an adverse judgment during the pendency of an appeal, and

that this right will be lost forever if execution is permitted prior to the entry of a final, appealable judgment); *see also Mantas v. Fifth Court of Appeals*, 925 S.W.2d 656 (Tex. 1996).

Accordingly, without hearing oral argument, we conditionally grant the writ of mandamus.[3] TEX. R. APP. P. 52.8. We direct the trial court to vacate its orders permitting execution of the judgment and releasing the funds in the registry of the court to Corcoran. We are confident that the trial court will promptly comply, and the writ will issue only if it does not.

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Wallace B. Jefferson
Chief Justice

OPINION DELIVERED: July 1, 2005

[3] We agree with JUSTICE O'NEILL that relators must submit a sufficient mandamus record. TEX. R. APP. P. 52.7(a) (requiring a relator to file "(1) a certified or sworn copy of every document that is material to the relator's claim for relief . . . and (2) a properly authenticated transcript of any relevant testimony from any underlying proceeding, . . . or a statement that no testimony was adduced in connection with the matter complained."). Neither party suggests that the record in this case lacks any material document or relevant testimony.